

VIA ECFS

September 19, 2016

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: *Promoting the Availability of Diverse and Independent Sources of Video
Programming*, MB Docket No. 16-41

Dear Ms. Dortch:

On September 15, Patrick Gottsch, CEO of RFD-TV and FamilyNet, and Steve Campione, CFO and COO of RFD-TV and FamilyNet, as well as Michele Farquhar and the undersigned of Hogan Lovells, met with David Grossman of the Office of Commissioner Clyburn, Robin Colwell of the Office of Commissioner O'Rielly, and with Martha Heller, Steve Broecker, Raelynn Remy, and Calisha Myers of the Media Bureau. On September 16, Mr. Gottsch and Mr. Campione, as well as Sarah Leggin and the undersigned of Hogan Lovells, met with Gigi Sohn and Jessica Almond of the Office of Chairman Wheeler, Marc Paul of the Office of Commissioner Rosenworcel, and Commissioner Pai and his chief of staff, Matthew Berry.

In the meetings, Mr. Gottsch and Mr. Campione strongly urged the Commission to vote in favor of a Notice of Proposed Rulemaking to protect independent programmers. They noted that a vast majority of the comments in this proceeding—over 36,000—have been filed in support of rural- and senior-oriented programming, including not only commenters from rural viewers, but also thousands of commenters from urban and suburban areas that enjoy RFD-TV's family-oriented programming. Moreover, they pointed out that more than 200,000 comments have been filed over the last three years in various proceedings from consumers who have expressed concern about the pervasive loss of rural programming, exemplified by Verizon FiOS's decision to drop not only RFD-TV, but also the Weather Channel, Sportsman's Channel, and Outdoor Channel, and Frontier's recent decision to drop FamilyNet (a free channel). They further explained that rural America and senior citizens are among the largest underserved populations in the country, and that any definition of diverse and independent programming should include programming aimed at serving rural America and senior citizens.

Mr. Campione explained that independent programmers are often forced to accept broad, unconditional most-favored nation ("MFN") provisions, with no opportunity for negotiation. Such provisions can prevent independent programmers from offering creative terms or promotional offerings to obtain new carriage agreements with other distributors. Even upon expiration of existing agreements, many MVPDs insist on simply renewing existing terms, with no opportunity for renegotiation, which leaves harmful MFN provisions effectively in place in perpetuity. Mr. Campione

urged the Commission to level the playing field for negotiations by disallowing unconditional MFNs that enable MVPDs to select favorable pricing without corresponding distribution obligations.

With respect to alternate distribution method (“ADM”) provisions, Mr. Gottsch and Mr. Campione explained that consumers increasingly want to purchase and watch content on an over-the-top (“OTT”) basis, but blanket ADM provisions prohibit RFD-TV from selling streaming packages to consumers who want them. Mr. Campione noted that the Commission’s parallel proceeding to increase competition in the set-top box market could paradoxically harm some existing independent programmers absent a prohibition on ADMs. Many ADM clauses in active programming contracts restrict independent programmers from distributing OTT content via apps on the very platforms that the Commission is proposing to include as competitive platforms for MVPD content, except on an authenticated basis. In other words, only customers who already have an MVPD subscription that includes RFD-TV would have access to the programming via an alternate platform under current ADM restrictions. But RFD-TV is only available to 50 percent of U.S. consumers. For programmers like RFD-TV that lack ubiquitous carriage, ADM clauses prohibit those programmers from selling their content on an OTT basis to large swaths of consumers on Roku, Apple TV, Chromecast, etc. For these reasons, Mr. Gottsch and Mr. Campione urged the Commission to prohibit enforcement of ADM provisions in order to give the Commission’s set-top box reforms a more meaningful impact.

Mr. Gottsch and Mr. Campione also argued that bundling practices by large programmers have the effect of squeezing out independent voices. Because MVPDs are forced to carry large bundles of programming, and distribute them on widely penetrated tiers, genuinely independent channels are frequently relegated to less penetrated tiers, and consumers frequently must pay extra to access the independent programming of their choice.

Finally, Mr. Gottsch and Mr. Campione also explained that certain MVPDs require their customers to enter into lengthy contracts and impose high termination fees. These practices raise switching costs and restrict the ability of consumers to select a different provider if their existing provider drops their preferred programming. These termination fees, in other words, inhibit the benefits of any competition among MVPDs by preventing consumers from voting with their wallets and influencing programming decisions. Mr. Gottsch and Mr. Campione therefore argued that the Commission should prohibit MVPDs from enforcing termination fees when MVPDs drop programming from a customer’s package, or, at a minimum, should require MVPDs to provide notice to their customers of any impending loss of programming at least as far in advance as the period when early termination fees would apply.

These proposals will provide narrowly-tailored guide posts within which programming negotiations involving independent programmers can occur on a more level playing field. As explained in RFD-TV’s comments in this proceeding, the Commission has legal authority to implement these proposals.¹ Prompt action on these measures is particularly necessary in light of recent industry consolidation. By giving independent channels like RFD-TV a fair opportunity to reach viewers, the Commission can help bridge the divide between rural and urban America and deliver diverse content to consumers nationwide.

Please contact the undersigned with any questions.

¹ See Comments of RFD-TV, MB Docket No. 16-41 (filed Mar. 30, 2016); Reply Comments of RFD-TV, MB Docket No. 16-41 (filed April 19, 2016).

Sincerely,

/s/

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